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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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NO. 78-1811

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TEXAS STATE BOARD OF
PUBLIC ACCOUNTANCY,

Petitioner

V.

UNITED STATES OF AMERICA,

Respondent

* * *

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

* * *

SUPPLEMENTAL BRIEF OF THE TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

* * *

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The petition for a writ of certiorari was filed on June 4, 1979. Shortly before that date and since it, there have been a number of developments which, we believe, should be brought to the attention of the Court to assist it in determining whether the writ of certiorari should be granted and particularly in passing on the point made by the United States in opposition to the petition that "[W]hile the case is not moot, the specific 'state action' question presented in the petition is thus no longer 'special and important,' see Rule 19 of the Rules of this Court . . . for the question of the validity of Rule 14 has no apparent prospective signigicance and should not arise again." (Brief in Opposition, p. 9)

The final order of the district court, as modified and affirmed by a split decision of the Court of Appeals

(Appendix B to the petition for writ of certiorari) is as follows:

> "ORDERED, ADJUDGED, and DECREED ...
>
> "1. That Defendant be enjoined from continuing, maintaining, or renewing the above-stated conspiracy and combination and from engaging in any other combination, conspiracy, contract, agreement, understanding or concert of action having similar purposes or effects, and from adopting, ratifying, or following any plan or practice having similar purposes or effects;
>
> "2. That Defendant be enjoined from promulgating, publishing, distributing or otherwise suggesting any rule prohibiting competitive bidding by Defendant's permit holders;
>
> "* * * *
>
> "4. That Plaintiff recover the costs of this suit."

While it is true that the Board did repeal Rule 14, it did so only because to have done otherwise would have placed it in contempt of court. This left the Board and the public accountants of Texas with no rule having to do with competitive bidding for engagements.

In its session ending May 27, 1979, the Texas Legislature adopted an act now known as the Public Accountancy Act of 1979 (Appendix to the brief in opposition of the United States) partially in response to assertions by the United States and by the courts that Rule 14 was not a "sovereign act" of the State of Texas.

The Public Accountancy Act of 1945 (Appendix E to the petition for writ of certiorari), under which Rule 14

was adopted, provided in its section 5 that:

> "The Board may promulgate, and may amend from time to time, rules of professional conduct appropriate to establish and maintain a high standard of integrity in the profession of public accountancy, . . ."

The 1979 Act is more specific, although it, too, contains broad grants of power to the Board to adopt "rules of professional conduct in order to establish and maintain high standards of competence and integrity in the practice of public accountancy and to insure that the conduct and competitive practices of licensees serve the purposes of this Act and the best interests of the public." (Brief in opposition, p. 6a) It provides that the Board in its rules shall not restrict competitive bidding *except if necessary* to insure that advertising, price information and other communications are informative, free of deception and consistent with professionalism; *except* to insure that the conduct and dealings of licensees are free from fraud, undue influence, deception, intimidation, etc., or *except* to regulate the competitive practices of licensees to the extent necessary to insure that contracts between a licensee and governmental bodies are not solicited or awarded on the basis of competitive bids submitted for such contracts in violation of law; or to insure that contracts for the preparation of financial statements which may be used by or given to a person not a party to the contract are not entered into on the basis of competitive bids (with exceptions); or to insure that

> "no licensee engages in any competitive practice which would impair the independence of or quality of services rendered by any licensee or which would impair or restrict the opportunity for members of the public to seek and secure high quality professional accounting services at reasonable prices or

> which would unreasonably restrict competition among licensees." (Brief in opposition, pp. 6a-8a)

In an abundance of caution and not desiring to be contemptuous of the districts court's order, the undersigned counsel for the Texas Board wrote the court and the Justice Department asking help in determining the extent to which the Board might adopt rules limiting competitive bidding under the 1979 Act. This was the basis upon which the United States asked this Court for an extension of time to file its brief in response:

> "Petitioner has asked Respondents what effect, if any, this Act will have on Respondent's intentions to enforce the judgment. This 60 days extension will permit the Respondent to review the legislation and events during that period may clarify the controversy presented for this Court's review." (Letter July 6, 1979, Wade H. McCree, Jr., Solicitor General to the Honorable Michael Rodak, Jr., Clerk, Supreme Court of the United States)

On September 1, 1979, the effective date of the 1979 Act, the Petitioner Board adopted rules of professional conduct on an emergency basis. Thereafter, on September 19, 1979, they proposed permanent rules, almost identical to the temporary rules, both of which include limitations on soliciting and competitive bidding. In the meantime, in an effort to insure that the rules would not in any way violate the injunction of the United States District Court which is the subject of this appeal, efforts were continued to secure the advice of both the court and the Justice Department. The Justice Department apparently was only willing to agree to entry of a memorandum opinion reciting:

> "The United States and the Board interpret the

> judgment as not prohibiting the Board from adopting a new rule concerning competitive bidding so long as the promulgation of that rule is state action falling within the rationale of *Parker v. Brown*, 317 U.S. 341 (1943), and subsequent Supreme Court cases interpreting that doctrine,"

and to have the district court adopt that statement. This would have begged the very question on appeal, that is, whether the adoption of Rule 14, in the first instance, and the adoption of other rules under the 1979 Act did in fact fall withing the rationale of *Parker v. Brown*. Thus, even in the minds of the Justice Department, the issues in this case are very much alive. The first question stated in the petition for writ of certiorari was:

> "1. Whether a board, created by a state legislature with its members appointed by the state governor by and with consent of the state senate and having authority to promulgate and adopt rules of professional conduct 'appropriate to establish and maintain a high standard of integrity in the profession,' is subject to the Sherman Act in the adoption and enforcement of such rules?" (Petition for writ of certiorari, p. 2)

Its importance is in no way lessened by events which have occurred since the petition for writ of certiorari was originally filed.

We would only add to what we have already said that the brief in opposition is one more effort on the part of the United States (and they have been successful in the past) to create the impression that the Texas State Board of Public Accountancy is some type of private organization, not acting for the State. In fact, it is the State and to the extent it exercised legislative powers properly delegated to it by the Texas Legislature in

adopting Rule 14, its determination of the policy of the sovereign state of Texas was the determination of the sovereign. No one else was going to make that decision. The Legislature had left it to the Board just as it now leaves to the Board many decisions as to what is necessary and proper in regulating the professional conduct of accountants. The activities of the Board were no less state action and were no less action of the sovereign because the Legislature could have revoked or amended the powers. Significantly, in this case, Rule 14 was the rule of the Board governing the practice of public accountancy for over thirty years and the Texas Legislature did *not* revoke the delegation of power to adopt rules during all that time and tacitly approved Rule 14 as well as the other rules.

This appeal is not about the validity of Rule 14. If it were, we would agree not only that the case was of no importance, but also that it is moot. The order of the district court quoted earlier in this supplemental brief makes no mention of Rule 14. Instead, it broadly enjoins the Board from engaging in any type of activity affecting competitive bidding by its members and the Justice Department has advised, implicitly, that should the Board adopt another rule, whatever its number, having a similar purpose or effect as Rule 14 without the rationale of *Parker v. Brown*, it will consider the action in contempt of court. What is in issue here is the extent to which a state professional regulatory board, with a broad delegation of authority from the state legislature, can adopt rules of professional conduct without subjecting itself, its members and its permit holders to possible antitrust liability. That is a viable question and one which deserves the attention of this Court.

For the foregoing reasons, the Texas State Board of Public Accountancy respectfully prays that the Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing supplemental brief of the Texas State Board of Public Accountancy was mailed, postage prepaid, by United States Certified Mail, return receipt requested, to Mr. Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530, Mr. John H. Shenefield, Assistant Attorney General, Department of Justice, Washington, D.C. 20530, and Mr. John J. Powers, III, Attorney, Department of Justice, Washington, D.C. 20530, this _____ day of October, 1979.

DAVID M. KENDALL